St. John's Law Review

Volume 19
Number 2 *Volume 19, April 1945, Number 2*

Article 6

July 2013

News-Gathering Agencies and Freedom of the Press

Seymour Launer

The alleged deception of the public gave no basis for relief because "when an injury is committed against the public, that is not a matter for complaint by plaintiff." The action for negligent misrepresentations fell because of failure to allege and prove that the defendants were under a duty to the plaintiff to act with care and that the plaintiff had acted upon the negligent statements to his damage.

The court further demonstrated that relief is available only through proof of special damages. Following the authorities developed long before the discovery of the radio, the court went on to say: "Moreover, with respect to the second and third causes of action, there are absent appropriate statements of special damage. In the most general terms, plaintiff has pleaded that defendant's acts and representations have caused it to lose sales and the opportunities to develop its business. A disparagement may cause injury to plaintiff and yet not be actionable. Both as a matter of pleading and proof there must be a definite showing of specific loss of trade, that is, loss of specific customers or sales." The plaintiff had a legitimate complaint, but not a legal complaint, a new member had joined the ranks in the field of *damnum absque injuria.*

Thirty years ago Dean Pound expressed with optimism a belief that a way would be found to grant relief in cases which fell short of the legal concept of unfair competition but which nevertheless resulted in business losses from negligent statements or misrepresentations. "In substance the traditional doctrine puts anyone's business at the mercy of any insolvent malicious defamer who has sufficient imagination to lay out a skillful campaign of extortion. So long as denial of relief in such cases rests on no stronger basis than authority our courts are sure to find a way out." [21] Perhaps thirty years is too soon in which to expect the courts to find a way, but it is hardly too soon to restate the optimistic hope; too many have never heard of the golden rule.

DONAL C. NOONAN.

NEWS-GATHERING AGENCIES AND FREEDOM OF THE PRESS

The *Associated Press* case [1] now awaiting final decision by the United States Supreme Court is a landmark in the history of freedom of the press.[2] The issue awaiting final adjudication has been

---

[21] Pound, *Equitable Relief Against Defamation and Injuries to Personality* (1916) 29 HARV. L. REV. 640, 668.

[1] United States v. Associated Press, 52 F. Supp. 362 (1943).

[2] *See* CHAFFEE, FREE SPEECH IN THE UNITED STATES (1941), for general reference on subject of free speech and press. Also see short note: WILSON, *Freedom of the Press* in CASES AND MATERIALS ON THE LAW OF TORTS (1939) 1150-2.

hotly fought by two groups with contrary opinions. The supporters of the Associated Press position maintain that any mandatory requirements with respect to changes in the Association's by-laws are a definite infringement of the right of free press guaranteed by the First Amendment to the Constitution.[3] They resort to the historic American concept of a free press and claim to be modern disciples of the Zenger tradition.[4]

The opposing group claims that, on the contrary, no question of the right of a free press is involved, nor is this a question of governmental repression such as plagued Zenger, when in the eighteenth century he criticized the British Colonial Government and was imprisoned therefor. The instant case, the supporters of the Government's position claim, is merely one, where under the cover of a vested constitutional right, a press association is attempting to monopolize[5] the stream of American journalism for its own ends by cornering the news-gathering market. To permit them to do this, they say, will result in the diminution and ultimate destruction of the right of a free press for those who are left without the magic pale of the Associated Press by its restrictive by-laws and exclusive privileges.

The Chicago Sun and Washington Times-Herald, in the Spring

---

[3] U. S. CONST. AMEND. I, "Congress shall make no law . . . abridging the freedom of speech, or of the press." This right is guaranteed against state restraint by force of the due process clause of the 14th Amendment. Gitlow v. New York, 268 U. S. 652, 666, 69 L. ed. 1138, 1145 (1925). *Also see* DODD, CASES AND MATERIALS IN CONSTITUTIONAL LAW (3d ed. 1942) 482.

[4] *See* 1 BEARD AND BEARD, RISE OF AMERICAN CIVILIZATION (1930) 185, 186. *Also see* 9 CADWALLADER, COLDEN PAPERS (N. Y. Historical Society Collection 1935) 283–355, 359–434.

The trial took place in New York in 1784, during the administration of Governor Cosby. This was the first real contest for freedom of the press. It began with the arrest of Peter Zenger, publisher of the Journal, for assailing the administration of the provincial governor. The jury defied the trial judge. and gave the editor his liberty. *See* Toledo Newspaper Co. *et al.* v. United States, 247 U. S. 402, 422, 62 L. ed. 1186 (1918), for a modern counterpart of the *Zenger* case. In the foregoing case, Justice Holmes, in a dissenting opinion, championed a newspaper editor's right to criticize a Federal District judge's decision.

[5] Justice Swan, dissenting in United States v. Associated Press, 52 F. Supp. 362, 375 (1943), strongly took issue with the charge that the Associated Press membership provisions tended toward monopoly, and indicated that there were other large associations to which the rejected applicant might turn, *i.e.*, International News Service, United Press, *etc.* But Justice Hand rejects this viewpoint when at 371 he states: "Monopoly is a relative word . . . The Associated Press is not a monopoly in the sense that it is absolutely necessary to the conduct of the activity . . . for there are few except the exclusive possession of natural resources without which activity is impossible. Most monopolies, like patents, give control over only some means of production for which there is a substitute." *Accord*, Fashion Originators Guild of America v. Federal Trade Comm., 114 F. (2d) 80, 85 (1940).

of 1943, were rejected from membership in the Associated Press by a vote of more than two to one. No reason can be assigned for their exclusion except that they were respectively opposed by the Chicago Tribune and the Washington Post and Star for competitive reasons. The by-laws of the Association require a majority vote to admit new members and when a member objects to admission of a new journal, the other members by a sort of senatorial courtesy invariably refuse to vote in favor of admittance.[6]

The Attorney-General's office took up the cudgels for the Chicago Sun, and filed a formal complaint, in which the Sun joined as *amicus curiae,* charging that the following by-laws of the Associated Press were arbitrary and severe and in restraint of trade in violation of the Sherman and Clayton Acts:

1. A prospective member must pay an initiation fee amounting to ten percent of all back annual assessments which the Associated Press received from members in his field, during the last forty-three years[7] [or three times the current annual assessment, whichever is greater].[8]
2. A member must furnish to the Association all news of member's district of "spontaneous" origin, *i.e,* spot news. No member shall furnish to any person who is not a member news of the Association in advance of publication.[9]

The Government asserts that these by-laws are a contract in restraint of trade. The Associated Press has answered that the attempted application of the Sherman and Clayton Acts to this agreement would infringe the fundamental law of the land that no statute shall be so construed as to abridge the freedom of the press. A free press, they state, requires that newspapers shall be free to collect and distribute the news in accordance with principles and standards established by themselves and they shall be free to choose their associates in so doing.[10] In this contention they are supported by Frederick Siebert, Professor of Journalism at the University of Illinois.[11] Professor Chaffee on the other hand feels that the assertion of liberty

[6] Chaffee, *The Associated Press Suit and Freedom of the Press,* Providence Journal-Bulletin, April 18, 1943, Sec. VI, p. 1, col. 2.

[7] *Ibid.* Professor Chaffee points out that this payment would amount to over $400,000 in Chicago and $1,000,000 in New York City. It is turned over to the rival membership newspaper in the same city for its use and benefit. Since these provisions can be waived by the rival, it is plain that virtual control of the admission of a new journal to the Associated Press is held by the existing member newspaper in the same city.

[8] By-Laws, Art. 3 (The bracketed portion was eliminated by the Associated Press before the case was heard by the Federal District Court).

[9] By-Laws, Art. 8.

[10] United States v. Associated Press, 52 F. Supp. 362, 375–77 (1943).

[11] Siebert, *A Defense of the Associated Press,* Providence Journal-Bulletin, April 18, 1943, Sec. VI, p. 2, cols. 1–5.

of the press in the Bill of Rights must mean something "much bigger than the right of some newspapers to deprive other newspapers of access to a vital channel of information merely because the insiders get there first. Liberty of the press is not the property of some newspapers or even of all newspapers [12] . . . in short, liberty of the press belongs most of all to the readers." [13]

Precedents are not wanting which indicate the necessity of some control over such an instrumentality as the Associated Press. In 1900 the Supreme Court of Illinois held that the Associated Press, which then had its headquarters in Chicago, had become a public utility subject to control in the public interest. The court, through its majority, said: "The corporation being engaged in a business upon which a public interest is engrafted . . . it can make no distinction with respect to persons who wish to purchase information and news for the purposes of publication, which it was created to furnish." [14] The Associated Press in protest against this decision moved its headquarters to New York. In the *International News Service v. Associated Press* case,[15] the Associated Press invoked judicial interference to prevent the International News Service from using its exclusive information. Though this relief was granted, Justice Brandeis, in a dissenting opinion, pointed out that it should have been refused until Congress had decided what were the proper limits for protection. He agreed with the Illinois decision, and thought that "news should be protected against appropriation only if the gatherer assumed the obligation of supplying it at reasonable rates and without discrimination to all papers which applied therefor." [16]

The case against the Associated Press reduces itself in the last analysis to two fundamental issues:

1. Whether the Government may prosecute this case under the authority of the "interstate commerce clause".[17]
2. Whether the by-laws of the Associated Press already noted establish facts adding up to the existence of combination or monopoly in restraint of interstate commerce so that the

---

[12] Chaffee, *supra* note 5, at col. 3.

[13] *See* leading case on liberty of press, Grosjean v. American Press Co., 297 U. S. 233, 80 L. ed. 660 (1936), in which the court said at 668: "The predominant purpose of the grant of immunity was to preserve an untrammeled press as a vital source of public information." *Accord,* Near v. State of Minn. *ex rel.* Olson, 283 U. S. 697, 75 L. ed. 1357 (1931).

[14] Inter-Ocean Publishing Co. v. Associated Press, 184 Ill. 438, 56 N. E. 822 (1900).

[15] 248 U. S. 215, 63 L. ed. 211 (1918).

[16] *Id.* at 268; *accord,* Duplex Printing Co. v. Deering, 254 U. S. 443, 488, 65 L. ed. 349 (1921).

[17] U. S. CONST. Art. I, § 8, "Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

Sherman Anti-Trust Act [18] and the Clayton Anti-Trust Act [19] might be invoked.

As to the first question, there is reason to believe that the United States Supreme Court will find that the Associated Press, by virtue of its nation-wide coverage and tremendous economic power, is in "interstate commerce". The Court so decided in the *Associated Press v. National Labor Relations Board* case [20] holding that freedom of the press did not invalidate an order of the Board forbidding the Associated Press to discourage employees from joining a labor union. The Court said that the Associated Press was in interstate commerce despite the fact that it does not sell news and does not operate for profit.[21] The practical abandonment of the distinction between "direct" and "indirect" effects on interstate commerce [22] and other recent extensions of the "interstate commerce clause" indicate a trend which is not likely to be reversed in the adjudication of the instant case.

With respect to the second question, there is some doubt as to how the Supreme Court will hold, for unless it can be shown that an organization such as the Associated Press is a public calling requiring admission of all qualified applicants, it would be difficult to prove "unreasonable restraint" under the Sherman and Clayton Act. The federal district court ruling,[23] rendered by summary judgment on affidavits and depositions submitted by both sides but without testimony in open court, found evidence sufficient to render the Sherman and Clayton Acts operative. The court ruled that the Associated Press' by-laws relating to the admission of new members and restrictions in news transmissions are illegal and in violation of both Acts and required the Associated Press to incorporate a provision in its by-laws that no newspaper should be denied membership for competitive reasons.[24]

---

[18] 26 STAT. 209, 15 U. S. C. A. §§ 1-2 (1890).

Sec. 1.—Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign Nations, is hereby declared to be illegal. . . . Every person who shall make any contract declared by Section 7 of this title to be illegal shall be deemed guilty of a misdemeanor.

Sec. 2.—Every person who shall monopolize, or attempt to monopolize or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign Nations, shall be deemed guilty of a misdemeanor, . . ."

[19] 38 STAT. 730, 15 U. S. C. A. § 13 (1914).

[20] 301 U. S. 103, 81 L. ed. 953 (1937).

[21] *Id.* at 128.

[22] Santa Cruz Fruit Packing Co. v. National Labor Relations Board, 303 U. S. 453, 82 L. ed. 954 (1938); *accord*, Consolidated Edison Co. v. National Labor Relations Board, 305 U. S. 197, 83 L. ed. 126 (1938).

[23] United States v. Associated Press, 52 F. Supp. 362 (1943).

[24] *Id.* at 370.

In declaring illegal the provisions with respect to membership (Art. 3) and provisions requiring a member to give its own news and newspicture services to any competing member and forbidding this information to non-members (Art. 8), the court pointed out that the latter provision was not invalid in itself, but rather part of an unlawful combination while the by-laws as to membership (Art. 3) are in force. While this condition maintains, the court felt justified in issuing an injunction against enforcement of both articles until the primary wrong is remedied.[25]. The court asserts the right to enjoin these practices on the ground that they result in a combination "unreasonably" [26] restricting interstate commerce, and hence are in violation of both the Sherman and Clayton Acts. However, if the by-laws with respect to membership were changed, the court indicated that the provisions as to news-gathering might not be "unreasonable" restraints and might therefore be legal. The same reasoning applies to a Canadian Press "cartel" contract wherein similar restrictions have been effected between a Canadian affiliate and the Associated Press. While the court found this arrangement illegal at present, *mutatis mutandis* it might not so find.

The court would not attempt to say what conditions for membership should be imposed, but held merely that members in the same "field" as applicant should not have power to impose or dispense with any condition of his admission and that the by-laws should affirmatively declare that possible competition with members in the same "field" should not be taken into consideration in passing upon the application.

The crucial problem which the Supreme Court must resolve and upon which the final decision in this case must turn is one upon which Justices Hand and Swan differed considerably in the decision now on appeal. It is the identical problem presented by Justice Brandeis in the *International News Service* case and by the Illinois Court before him in the *Inter-Ocean Publishing* case upon both of which we had occasion to comment earlier.[27] Can the business of the Associated Press be found to be a public calling so that its restrictions as to news-gathering and membership can be considered "unreasonable" restraints? Justice Swan states, "What then is the ground for holding the by-law provisions in unreasonable restraint of trade in news-gathering or newspaper publishing? Solely the court's view that a news-gathering organization as large and effective as the Associated Press is enjoying a public calling, and so is under

[25] *Id.* at 374.

[26] American Tobacco Co. v. United States, 221 U. S. 106, 55 L. ed. 668 (1911).

[27] *See* notes 14 and 15.

a duty to admit all qualified applicants on equal terms." [28] Justice Swan does not find the Associated Press such public calling [29] nor does he find that the common law makes it such. If the business of news-gathering is to be cloaked with a public interest,[30] he feels such duty should be imposed by legislative and not judicial fiat. Justice Hand, however, states, "that argument is flatly contrary to the well-settled common law of contracts in restraint of trade. Congress has already acted by selecting the standard of the common law to measure its will. Historically that standard can only be applied by assessing the public importance of the activity which by hypothesis has been restricted." [31]

Thus the issue is joined and the United States Supreme Court will shortly render its verdict as to the validity of the foregoing arguments. Both sides have appealed the district court's decision, the Associated Press assigning errors in the nature of the evidence and demanding dismissal of the complaint on the ground that the Government has failed to state a cause of action,[32] whereas the Government is seeking a sterner verdict, particularly with respect to the Canadian Press "cartel" arrangement of the Associated Press.[33]

SEYMOUR LAUNER.

---

[28] United States v. Associated Press, 52 F. Supp. 362 (1943) 373.

[29] *Id.* at 375.

[30] *See* O'Connell, *Any Business Can Be Made a Public Utility,* Public Utilities Fortnightly, Aug. 17, 1944, for interesting discussion of changing concepts of the nature of public callings.

[31] United States v. Associated Press, 52 F. Supp. 362, 376 (1943).

[32] "A.P. Says Suit Asks Papers Aid Rivals," N. Y. Times, Dec. 6, 1944, p. 19, col. 1.

[33] As this issue was going to press, the United States Supreme Court in a 5-to-3 decision affirmed in full the opinion of the Federal District Court. The appeals of both the Associated Press and the Justice Department were rejected.

The majority opinion, written by Associate Justice Hugo L. Black, held that the lower court had correctly found, "that the by-laws in and of themselves were contracts in restraint of commerce in that they contained provisions designed to stifle competition in the newspaper publishing field."

The Supreme Court also upheld the lower court's requirement that the Associated Press will have to: (1) Revise its by-laws to eliminate provisions permitting a member to keep a competing newspaper in the same field from becoming a member for competitive reasons. (2) Suspend exclusive news contracts with its members and with the Canadian Press until the by-laws have been changed.

Associate Justice Stanley F. Reed, William O. Douglas, Wiley B. Rutledge and Felix Frankfurter concurred in the majority opinion, the latter in a separate opinion. Chief Justice Harlan F. Stone and Justices Roberts and Murphy dissented.

"Court Decides Against the A.P. in Trust Case," N. Y. Herald Tribune, June 19, 1945, p. 1, col. 6.—Ed.